No. 70.

Brief of Dillon, Anderson & Williams for Appellants.

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Supreme Court of the United States.

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LOUIS B. ADAMS and WATSON N. SCHILLING,
Appellants,

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of Edward A. Reed, deceased, and MILLIE G. REED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF SUBMITTED ON BEHALF OF ADAMS AND SCHILLING, APPELLANTS.

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Statement of Facts.

In March, 1890, appellants Adams and Schilling agreed to sell and convey an undivided two-thirds interest in certain lands in Weber County, Utah Territory, to Edward A. Reed and Hiram H. Henderson for the sum of $7,333.32.

In pursuance of this agreement Adams and Schilling, with their respective wives as grantors, executed and

delivered to Reed and Henderson, as grantees, the deed in which the property to be conveyed was described as follows :

"An undivided two-thirds of the east half of section nine, township six north, of range two west, of the Salt Lake meridian ; also, an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section."

See Referee's Findings I. and IV., pp. 18 and 19.

By mistake of the scrivener, who prepared the deed, the premises to be conveyed were described as lying in township six, instead of being described as lying in township five.

See Finding VI., page 19.

Both grantors and grantees understood that the property which the grantors agreed to sell and which the grantees agreed to buy was located in township five.

See Findings I. and II., page 18.

The said defendants Reed and Henderson, at the time of receiving said deed mentioned in Finding No. IV., paid to the plaintiffs Adams and Schilling one-third the purchase price of the land intended to be purchased—to wit, two thousand four hundred and forty-four and $\frac{44}{100}$ dollars of the purchase money—in cash, and executed their two certain promissory notes in favor of Adams and Schilling for the sum of two thousand four hundred and forty-four and $\frac{45}{100}$ dollars each, bearing eight per cent. interest and payable one year and six months from March 26, 1890; which said notes were secured by a mortgage back on the same land for the residue of the purchase money; which land was also described in said mortgage, by mistake of the scrivener who prepared the same, as lying in township six instead of township five north, of range

two west, of the Salt Lake meridian, when it was intended to be described as lying in said township five.

See Finding VII., page 19.

The lands which the grantors and grantees both had in mind when the contract was made and when the deed was delivered are in Weber County, Utah, and are within ten miles of the line of the Union Pacific Railroad, and are within the limit of lands granted to the Union Pacific Railroad Company by the Act of Congress of July 1st, 1862. These lands are and have been heretofore used and cultivated as agricultural lands, and lie in a valley at the base of the Wasatch Mountains.

See Finding XI., page 20.

The title of Adams and Schilling to the lands in question was derived from the Union Pacific Railroad Company through various mesne conveyances, by means of which the entire title which the Union Pacific Railroad Company had was vested in Adams and Schilling at the time of the contract and conveyance to Reed and Henderson.

See Findings XXIV. and XXV., page 24.

The only possible qualification to this proposition is whether the release from the Union Pacific Railroad Company referred to in Finding XXIII. on page 24, was a complete and sufficient release of what is called "the coal reservation," referred to in Finding XXII., page 24.

This subject will be further discussed in Point V.

On or about the 3d day of September, 1891, Reed and Henderson, having ascertained that Adams and Schilling were not the owners of the land described in the deed which had been delivered to them —that is to say, were not the owners of land in township six— stated orally to Adams and Schilling that they rescinded the said contract of sale, and demanded

back from the said grantors the sum of $2,444.44, with interest, and also demanded a surrender of any outstanding notes and a reimbursement of all amounts paid by them for interest under the said contract.

See Findings XIX. and XX., page 23.

This alleged rescission was not, however, accompanied by any tender of reconveyance from Reed and Henderson, the grantees, to Adams and Schilling.

Shortly thereafter, and on or about September 29th, 1891, Adams and Schilling tendered to Reed and Henderson another deed to them, a special warranty deed, which contained a proper description of the land intended to be conveyed, and which deed Reed and Henderson refused to receive, declaring that they had rescinded the contract of sale.

See Finding XXI., page 23.

On April 16th, 1867, the Union Pacific Railroad Company mortgaged its land grant, including the premises in question, to Cyrus H. McCormick and John Duff, as trustees, to secure the payment of ten million dollars. By the terms of the mortgage the trustees were empowered to release the lien of the mortgage upon any particular tract or parcel of land.

On December 18th, 1873, the Union Pacific Railroad Company mortgaged its land grant, including the said premises, to the Union Trust Company of New York, as trustee, with similar power to release. The mortgage to the Union Trust Company further provided that the trustees under the said first mortgage to McCormick and Duff had power and authority to release the lien created by the mortgage to the Union Trust Company by joining in the deed with the Union Pacific Railroad Company.

See Finding XII., pages 20 and 21.

The Union Pacific Railroad Company by warranty deed dated December 11th, 1883, and recorded February 4th, 1885, conveyed to William Van Dyke the

northwest quarter of the northeast quarter of section nine, township five north, of range two west, of the Salt Lake meridian, being part of the premises involved in this action.

The Union Pacific Railroad Company by warranty deed dated July 2d, 1887, conveyed to John Selman the northeast quarter of the northeast quarter of section nine, township five north, of range two west, of the Salt Lake meridian.

See Findings XIV. and XV., page 21.

Frederick L. Ames, the sole remaining trustee under the first mortgage above referred to to McCormick and Duff, united with the Union Pacific Railroad Company in these two conveyances, and thereby the said lands were released from the lien of the two mortgages above mentioned.

See Finding XV., page 21.

On January 22d, 1886, William Van Dyke by warranty deed conveyed to Adams and Schilling the northwest quarter of the northeast quarter of said section nine, township five north, of range two west, of the Salt Lake meridian, and on the 27th of September, 1887, John Selman by warranty deed conveyed to Adams and Schilling the northeast quarter of the northeast quarter of said section.

See Finding XV., page 21.

On the 18th day of October, 1889, the Union Pacific Railroad Company and the Union Trust Company conveyed directly to Adams and Schilling the south half of the northeast quarter, the east half of the southwest quarter and the southeast quarter of section nine, township five north, of range two west.

On the 4th day of June, 1888, the Union Pacific Railroad Company and Frederick L. Ames, trustee, conveyed directly to Adams and Schilling the southwest quarter of the southwest quarter of said section nine.

See Finding XVI., page 22.

The deeds from Van Dyke, Selman and the Union Pacific Railroad Company contained in their respective descriptions all of the premises involved in this litigation.

No patent has ever issued from the Government for the land intended to be conveyed by Adams and Schilling to said Reed and Henderson in township five, section nine north, of range two west, of the Salt Lake meridian.

See Finding XVIII., page 22.

This action was brought by the sellers Adams and Schilling against the purchasers Reed and Henderson for the purpose of having the mortgage reformed and corrected, so as to describe the property as being in township five, instead of township six, and for a foreclosure of the mortgage reformed in manner aforesaid.

See Prayer for Judgment, pages 7 and 8.

The defendants by answer deny that the said Adams and Schilling are the owners of the property intended to be sold to the defendant, and also allege that the sellers represented their title to these lands to be good and that the purchasers bought the lands on the faith of such representations.

The defendants also allege that they, upon the discovery of the mistake in the deed, and before the tender of the new deed, elected to rescind the said contract, and demanded back the purchase money.

The defendants have also filed a cross-bill, setting forth these same matters, and asking by way of relief that their said mortgage and outstanding notes be canceled, and that they have judgment against the plaintiff for the amount of payments heretofore made by them.

See Record, pages 13, 14 and 15.

The case was heard before JACOB S. BOREMAN, as Special Master in Chancery and Referee, and he re-

ported in favor of the defendants and against the plaintiffs.

See his Findings of Fact and Law, pages 18 to 26.

Upon these findings the District Court for the Territory of Utah passed final judgment in favor of the defendants and against the plaintiffs, declaring the contract of sale for the premises in question to be null and void, declaring the mortgage given to secure the balance of the purchase money to be null and void, and adjudging that the defendants recover against the plaintiffs the sum of $3,520 with interest at the rate of eight per cent.

See page 27 of Record.

Upon a case containing the judgment roll and all the evidence plaintiffs Adams and Schilling appealed to the Supreme Court of the Territory of Utah. On this appeal the judgment appealed from was affirmed. The opinion of affirmance is contained in the Record, pages 47 to 57.

This is an appeal taken by Adams and Schilling from the judgment of the Supreme Court of the Territory, now State, of Utah.

The pleadings and the exceptions taken and the conclusions of law present the following three questions:

First. Did the sellers Adams and Schilling have title to the said premises at the time of the sale by them to Reed and Henderson?

Second. Was the title of Adams and Schilling in any manner encumbered at the time of the sale?

Third. Did the sellers Adams and Schilling make such fraudulent and false representations as to their title to the purchasers Reed and Henderson as would justify the purchasers in rescinding the sale and recovering the purchase money paid by them?

ARGUMENT.

POINT I.

The sellers Adams and Schilling had good title to the premises in question at the time of the sale to Reed and Henderson.

The title of Adams and Schilling, as we have seen, was either derived directly from the Union Pacific Railroad Company or indirectly from that company through grantors Van Dyke and Selman. The lands were included within the Union Pacific land grant conferred upon that company by the Act of July 2d, 1862. It is entirely settled that, by the terms of this act and subject to the exceptions therein contained, there was granted to the Union Pacific Railroad Company an immediate legal title to the lands referred to in the grant, which lands became fixed as to metes and bounds by the location of the road.

Deseret Salt Company vs. Tarpey, 142 U. S., 241.
Schulenberg vs. Harriman, 21 Wall., 44.
Railroad Company vs. United States, 92 U. S., 733.
Railroad Co. vs. Railroad Co., 97 U. S., 491.
Railroad Co. vs. Baldwin, 103 U. S., 426.
Grinnell vs. Railroad Co., 103 U. S., 739.
Wright vs. Roseberry, 121 U. S., 488.
Rutherford vs. Green Heirs, 2 Wheaton, 196.

The respondents, while conceding that the legal title *in presenti* passed, by the terms of the act, to the Union Pacific Railroad Company, take the ground that under the principle of the case of Barden vs. the Northern Pacific Railroad Company, 154 U. S., 288, the title of the Union Pacific Railroad Company to the whole of its land grant is open to question, and is not

such a title as will satisfy a contract to convey land by a good title. Their contention is that, under the decision quoted, the discovery of mineral upon any portion of the land grant at any time in the future will avoid the grant of the railroad company. It therefore follows that this element of uncertainty, this gift in fee, liable to be defeated by the discovery of mineral, is not such a title as was stipulated for in the agreement of sale between Adams and Schilling as sellers, and Reed and Henderson as buyers.

We submit at the very threshold of the argument that the case of Barden vs. Northern Pacific Railroad Company does not establish any such principle. It was in that case *conceded that the lands in question were mineral lands.* The only question involved in that case was whether the exception of mineral lands contained in the grant should be limited to lands known to be mineral at the time of the grant, or whether the exception should extend to lands at any time in the future ascertained to be mineral. The Court decided that the exception extended to all mineral lands, whenever ascertained to be of that character, but it does not follow that the company had no title in fee simple to any portion of its land because mineral lands are excepted, whether known to be such at the time of the grant, or ascertained to be such at a later date.

It is a matter of common notoriety that will not be disputed that an enormous proportion of the lands granted contain no mineral. This is true as to substantially all the lands in Nebraska and Kansas, and a very large proportion of the lands in Wyoming and Utah.

The question, therefore, to be passed upon in the case at bar is whether, under the rules of evidence and principles applicable to actions brought for the rescission of contracts, the title of the Union Pacific Railroad Company should be considered bad because of the possibility of the lands in question being embraced within the exception of the statute, or whether, by the

rules of evidence applicable to such cases, the title of the railroad company must be considered good until the party seeking to rescind and avoid his contract establishes by evidence that the lands in question contain mineral, and are, therefore, excepted from the grant.

Clearly, if the lands are not mineral a great injustice is done by a decree which rescinds the contract and awards judgment in favor of the purchaser to recover the amounts paid by him, and declares the securities he has given to be void.

The exception of mineral lands in no manner affects the nature of the railroad's title to lands which are not mineral. The exception merely refers to a geographical location of lands of a certain character, as to which the grant does not become operative. The Court cannot, therefore, assume that the exception in question applies to the lands in controversy unless the case contains some evidence upon which that assumption can be based.

This appeal, the Court will bear in mind, is from a decree declaring the contract between the perties to be void, declaring the mortgage given to secure part of the consideration to be void, and declaring the purchasers to be entitled to recover from the sellers the moneys paid for the lands sold.

It is impossible to sustain these conclusions unless it be assumed that in an action to rescind the contract the plaintiff is entitled to recover, unless the defendant not only proves affirmatively that he has title to the lands, but disproves any transaction, exception or occurrence whatever by which the title so acquired might be affected or impaired.

Before referring to the authorities which determine the presumptions of law applicable to actions for the rescission of contracts, we desire to call the Court's attention to the widespread disaster which would result to titles innumerable if the rules were as above stated.

The Union Pacific Railroad Company, the Northern Pacific Railroad Company, the Central Pacific Railroad

Company—in short, all the railroad corporations which have received land grants from the Government of the United States—have conveyed innumerable tracts of land to a vast number of grantees, who in turn have conveyed the premises so acquired by them to subsequent grantees, and in whom the title is now vested.

It is entirely within limit to say that the titles so held represent over one hundred thousand transactions in all of which the original title is derived from a railroad land grant. The exception of mineral lands is contained in all these grants. If, therefore, it be true that the existence of this clause or exception is sufficient to entitle a present holder to a rescission of the contract of purchase under which he now holds and to recover back his purchase money, the entire line of intermediate grantors and grantees between the railroad company and the present holders are exposed to innumerable litigations in which they will be absolutely without defense and necessarily compelled to refund all proceeds received by them on the sale of these lands to every present holder who by reason of declining prices elects to rescind his purchase. We say advisedly that the defendants in these innumerable litigations would be defenseless because it would be impossible for them to prove that the lands in question were not mineral. An exploration to the depth of twenty feet will be insufficient because the mineral might be discovered at a lower level. An exploration of ten acres out of a section would be insufficient because mineral might be discovered in the remaining portion of the section. The expense involved in explorations of this nature would vastly exceed the value of all agricultural lands; in fact, in many cases, as is well known, it more than exhausts the value of mineral lands. What relief then is open to the unfortunate seller when confronted with the proposition that because the lands he has sold in good faith may possibly be discovered to be mineral lands he must surrender the proceeds of sale and be adjudged to have

forfeited all rights under his contract. Nor is this the whole extent of the misfortune which must result from the establishment of so severe and arbitrary a rule.

The railroad companies which were the origin of the title have substantially all in the lapse of time become insolvent, have passed through receiverships and been reorganized through the agency of new corporations. The obligations of these new corporations do not extend to the corporate liabilities of the insolvent corporations which have passed out of being, so that while endless recoveries would occur as between the grantees respectively no final satisfaction could be had against the corporations themselves.

Unless some unbroken line of decisions compels this Court to adopt the principle of presuming against the validity of the title of the grantor in cases of this nature, we submit that the true rule applicable to actions for the rescission of contracts is that the party seeking the rescission must bear the burden of proving that the title of his grantor is bad.

For the purposes of this appeal, the case at bar must be considered as an action in which Reed and Henderson are plaintiffs and Adams and Schilling are defendants. The mistake in reference in the original deed to township six instead of township five being conceded to have been a mere accident or error of the clerk who drew the deed and it being conceded that both grantors and grantees understood and intended that the lands conveyed by the deed were actually in township five, it follows that the right to have the deed and mortgage reformed, if the case presented no other question whatsoever, is beyond dispute. In like manner, if no propositions affecting the title of Adams and Schilling were contained in the case, the right of Adams and Schilling to a foreclosure of their mortgage would be beyond question.

It, therefore, follows that on the issue litigated; that is, the right to a rescission of the contract, to a cancellation of the securities and to recover by judgment

the amounts paid, depends upon a cause of action in favor of Reed and Henderson and against Adams and Schilling.

In so far as the question of the nature of the title of the Union Pacific Railroad Company to the lands in question is concerned, the only finding of the Referee which bears on this point is finding XI., on page 20, which is as follows:

> "That the lands described in finding two are in Weber County, Utah, and are within ten miles of the line of the Union Pacific Railroad, and are within the limit of lands granted to the Union Pacific Railroad Company by the Act of Congress of July 1st, 1862; that the lands in controversy are, and have been heretofore, used and cultivated as agricultural lands, and lie in a valley at the base of the Wasatch Mountains, and that no exploration nor examination has ever been made on said lands for coal or minerals of any kind or description."

The conclusion of law which is based upon this finding is contained on page 25, numbered 2, and is as follows:

> "2. That the plaintiffs have not now, nor never did have, a good title in fee simple to the above-described land, and that the several notes given by the defendants to the plaintiffs, including the note given to the bank and the sums of money paid by defendants to the plaintiff, were all without consideration."

We submit that the finding of fact, taken in connection with the terms of the grant contained in the Act of July 2d, 1862, is not sufficient to support the conclusion of law and the decree which is thereupon based, and that for this reason the decree should be reversed, and the case remanded for a new trial.

POINT II.

In an action to rescind a contract relating to the sale of real estate based upon an allegation that the seller has not such title as he contracted to convey, the burden of proof is on the party seeking to rescind.

It is a principle of universal application that the burden of proof rests upon the party asserting a right.

In so far as the decree appealed from declares the contract between the parties to be not binding and adjudges that the defendant, the purchaser, shall recover the purchase money which the plaintiff, the seller, had received from the defendant, it is the defendant who asserts the right to recover and it is upon the defendant that the burden of proof must rest.

Courts will not interfere to take property from one and give it to another without requiring the claimant to establish his right to the relief claimed by sufficient proof.

Sufficient proof means proof which satisfies the Court that the facts upon which the alleged right depends are true.

If the proofs offered are equally consistent with the existence as with the non-existence of the facts upon which the alleged right depends, the party on whom the burden of proof rests must fail.

In the case under consideration, the question of fact upon which the alleged right of Reed and Henderson to recover the purchase money paid to Adams and Schilling is the question whether the lands intended to be conveyed were excepted from the grant of the United States to the Union Pacific Railroad.

The proofs offered, as shown by finding XI., are that the lands are included within the limits of the grant,

that they have been used as agricultural lands and that no exploration has ever been made on said lands for minerals.

But these facts are quite as consistent with the conclusion that the lands are agricultural, and therefore included in the grant, as they are with the conclusion that the lands are mineral and therefore excluded.

We say quite as consistent, but in point of fact if we should test the question by the proportion of mineral lands to agriculture it would be safe to say that it was a thousand to one that the lands are in fact agricultural.

Is it just that a purchaser should have judgment for purchase money paid against a seller without actual proof that the seller is in default?

The above proposition as to the burden of proof is entirely elementary and hardly requires citation of authorities.

See

1 Greenleaf on Evidence, Section 74.
Stevens on Evidence, Article 93.
Baylie on *Onus Probandi*, 65.

The most favorable view of the right of Reed and Henderson to the judgment appealed from is that their right to rescind rests upon the allegation that their grantor was not seized of title at the time of such conveyance, and that in an action for breach of the covenant of seizin the burden of proof is on the grantor to establish his title.

This was at one time the rule of law applicable to actions for breach of the covenant of seizin, but the reasons for the rule have ceased to exist and the rule itself has been repudiated in very many cases.

Woolley vs. Newcombe, 87 *N. Y.*, 603.

In this case the Court reviews numerous old cases holding that in actions for breach of the covenant of seizin where no evidence was offered on either side

except the deed from the grantor to the grantee, the grantee was entitled to judgment.

At page 611 of this case the Court explains that the reason for this rule is to be found in the system of conveyancing prevalent in England when the rule was established. It is founded on the fact that deeds and muniments of title generally covered large tracts, and the owners of estates retained them in their possession, thus keeping to themselves and under their control all the evidence which would establish their title and their seizin. In these circumstances it was thought not unreasonable to require the grantor in an issue of seizin to assume the burden of proof. On page 612 the Court says:

> "Under these customs and this state of the law, and before the recording acts, it is easy to understand why it should be held that in an action on the covenants of seizin the vendor was bound to disclose his title. He was allowed to retain the evidence thereof for the very purpose of answering to these covenants. It is equally manifest that under our present system of conveyancing and making the title to real estate matter of public record as accessible to the vendee as to the vendor, the reason for the former rule entirely fails."

Under the principle of this case, the burden of proof must be held to rest on the grantee. The proof of the seizin of Adams and Schilling does not depend upon title deeds in their possession or upon any muniments of title which they control. It depends solely on the question of fact whether the land does or does not contain mineral. The grantor, therefore, cannot satisfy the burden if it is cast upon him, except by actual proof that the land does not contain mineral, which is substantially impossible. The grantee, on the other hand, can prove that Adams and Schilling were not seized by proving that the land is mineral, and if this

were in fact the case the production of the proof would not be difficult. If the burden of proof in cases of this character is cast upon the grantor, uncertainty will be cast upon the vast number of titles which have been derived through the various railroad grants, titles will become insecure and will cease to be available as the basis for loans, and in times of depression or of falling values all grantees will be enabled at any time, either to recover from their grantors in actions for breach of the covenant of seizin or to rescind contract for the sale of land and to recover the purchase money paid. The production of a deed from a grantor to a grantee, without further proof, will be sufficient to entitle the grantee to a judgment that the grantor was not seized at the time of the conveyance. The grantor cannot protect himself, except by actual proof that the land is not mineral, which proof, except by expensive and exhaustive explorations, it would be impossible to procure.

On this point we also cite :

Mathias vs. Tennessee R. R. Co., 83 Alabama, 411.

In this case there was a land grant to the State of Alabama to aid in the construction of certain railroads in that State. The defendant railroad had entitled itself to 120 sections of land within the first twenty continuous miles of its railroad to be selected and located within 15 miles of the line of its road.

The suit was brought by the Tennessee and Coosa Rivers Railroad Co. against James Mathias and another for the purchase money due and unpaid on a contract of sale. The plaintiff's proofs consisted of :

The Act of Congress of June 3d, 1856, granting the lands.

The Act of the General Assembly of Alabama, approved January 20th, 1858, conferring upon the Tennessee and Coosa River Railroad Company so much of the lands as were granted for the purpose of aiding in

the construction of the Tennessee and Coosa River Railroad Company's railroad.

The selection and location of the 120 sections of the lands so granted of the State of Alabama by the said Act of Congress, the certification thereof by the Governor to the Secretary of the Interior, and the approval of the same by the Secretary on June 27th, 1860.

No proof was offered to show whether or not the lands in question were embraced within the first twenty continuous miles.

It was conceded that if the land in question was beyond the twenty-mile limit the railroad corporation could convey no title; while, on the other hand, if within the 20-mile limit, the defense attempted was worthless.

The Court held that the burden of proof rested on the purchaser of showing whether the land does or does not lie within the sections the corporation was authorized to sell.

Applying this principle to the present case, if the land sold by Adams and Schilling was not mineral, they had good title and power to sell. If it was mineral, they had no title. The suit is brought by the seller to recover the balance of the purchase money. Under the case last cited, the burden rests upon Reed and Henderson, the purchasers, of showing whether the land is or is not mineral. Reed and Henderson acquired the full title and right of possession under the deed actually made to them, and have had the peaceable and undisturbed enjoyment of the premises ever since.

The 26th Finding, at page 24 of the Record, is that after the conveyance Reed and Henderson, as landlords, let and demised the lands in question to Adams and Schilling, the defendants. The words at the conclusion of this finding on page 25, that the defendants never actually occupied any of the said land, can have no possible effect upon the rights of the parties, because the possession of a landlord who demises prop-

erty to a tenant is the precise equivalent of actual possession by the landlord. The mere question of occupation is without importance.

We also cite

Greenblatt vs. Herman, 144 N. Y., page 13.

This was an action brought by a purchaser for specific performance, praying also that if the seller could not perform he should be adjudged to repay the purchase money. The seller's title had been derived through the administrator of one Charles W. Nichols, whose title was conceded. The administrator's right to convey the property depended upon certain proceedings in the Surrogate's Court, and the objection to the title was that the record of the Surrogate's Court did not show that all the heirs of Charles W. Nichols had been made parties. The Court held that in the absence of proof showing the existence of omitted heirs the purchaser was bound to accept the title. The language at page 20 is as follows :

> "The title is not doubtful by reason of any fact shown or by reason of any inference from any such fact. It is a possibility merely that such heirs may exist. But the plaintiff has not seen fit to give any proof on the subject, and has left it to conjecture merely, and a suspicion or conjecture, without any facts to support it, does not raise a reasonable doubt as to the validity of a title good upon the record."

In the present case, Reed and Henderson based their right to recover the purchase money paid by them upon the suggestion that Adams and Schilling's lands may be mineral. They offer, however, no proof in support of this fact. Within the principle of the case last cited the mere conjecture that mineral may be discovered in the land is not sufficient to cast a doubt upon the title conveyed by Adams and Schilling.

We cite further on this point :

Butler vs. Miller, 15 B. Monroe, 617.
Hunt vs. Utter, 15 Ind., 318.
Beauford's Administrator vs. Guthrie, 14 Bush, 677.
Simpson vs. Hawkins, 1 Dana, 303.
Landt vs. Major, 31 Pac. Rep., 524, Col. Appeals.
Union Pacific Railway Co. vs. Barnes, 64 Fed. Rep., 80.
McNeill vs. Colkins, 50 Ill. Appeals, 17.
Peck vs. Houghtaling, 35 Mich., 127.

There is nothing inconsistent with the proposition made in this point in

Corinne Co. vs. Johnson, 156 U. S., 574.

Plaintiff in that case claimed title under the Union Pacific land grant. The action was ejectment. The burden was confessedly upon the plaintiff.

The Court held that the plaintiff could not recover unless he proved not only that the lands were within the grant but also that they were not within the exception.

In the case at bar the positions of the parties are reversed but the principle applicable to the right of recovery is the same.

Reed and Henderson claim to recover because the title of their grantor is bad.

But to prove the title bad it is necessary to prove that the land was within the excepted lands. Without this proof it is impossible to conclude that the plaintiff's title was bad.

In ejectment the basis of recovery is that plaintiff's title is good, and he is held to complete proof of the allegation.

In an action to rescind the basis of recovery is that the grantor's title is bad, and the party seeking to rescind should be held to the like complete proof.

In like manner there is nothing inconsistent with the proposition made in this point in

Maxwell Land Grant Co. vs. Dawson, 151 U. S., 586.

That was also an action of ejectment, and the decision of the Court, as stated on page 604, is as follows:

> "Where there is an exception in the general granting or enacting clause, the party relying upon such general clause must, in pleading, state the general clause, together with the exception, and must also show by the testimony that he is not within the exception."

The only conclusion to be drawn from this decision is that in an action of ejectment the burden would rest on Adams and Schilling to prove that the land to which they claim title was not within the exception, but it by no means follows that when the grantees of Adams and Schilling sue them to recover purchase money paid to their grantors that the same burden rests upon them. On the contrary the burden of proof that the land *was within the exception* and Adams and Schilling's title *was bad*, rests upon Reed and Henderson before they can ask for a judgment to recover the purchase money paid by them.

Ankeny vs. Clark, 148 U. S., 345.

In this case Ankeny was the seller and Clark the purchaser of certain lands. Ankeny's title was derived from the Northern Pacific Railway Co. The action was brought by Clark to recover the value of a quantity of wheat which had been delivered by Clark, the purchaser, to Ankeny, the seller, in payment for the land. Clark's right to recover depended on Ankeny's right to apply the wheat in satisfaction or payment for the land sold by him.

It appeared in the case, and was not disputed, that Ankeny had refused to give a warranty deed for all of

the property, and had only offered a quitclaim deed for the railroad land, as it was called, which formed part of the property sold (see p. 147). Clark refused to accept this deed, and gave formal notice that unless within five days from the date of the notice Ankeny should convey a perfect title to the whole of the land sold by him by a good and sufficient conveyance he (Clark) would abandon and surrender the possession of the land to Ankeny (see pp. 147 and 148).

The defective nature of the deed tendered and the refusal after notice to tender a proper deed is evidently sufficient ground upon which to rest the conclusion of the Court that Clark was entitled to recover the value of the wheat. The opinion in the case was written by Mr. Justice SHIRAS, but whether the affirmance of the Court rested upon the points chiefly discussed in the opinion or upon the conceded refusal of Ankeny to give a proper deed does not appear.

In the opinion the Court does discuss the question whether Ankeny's title as derived from the Northern Pacific Railway Company was good. The objection to the title, as it appears at page 356, is as follows :

It was conceded by stipulation that the railroad was completed in 1880, that the route of definite location had been filed, and the road had been duly accepted by the President of the United States ; that the Northern Pacific Railroad Co. had executed and delivered to one Peter Huff a warranty deed of the land in question, and that said Peter Huff, with his wife, executed and delivered to Ankeny a warranty deed thereof. The Court thereupon states the objection to the title as follows :

> " Upon this state of facts it was contended by the plaintiff Clark that there was nothing to show that the Northern Pacific Railroad Company had paid into the Treasury of the United States the cost of surveying, selecting and conveying the same as prescribed by the Act of July 15, 1870,

nor to show that any patent had been granted to the railroad company."

At page 358 the Court finds that under the stipulation as to proofs made in this action it did not appear that the railroad company had "complied with the necessary conditions as to payment of costs of survey." The objection to Ankeny's title is not put by the Court on the ground that no patent had been issued; in fact, the cases cited in the first point of this brief show that this Court has repeatedly held that the title passes by the grant irrespective of the patent (see particularly Deseret Salt Co. vs. Tarpey, 142 U. S., 241). But the objection to Ankeny's title is put by the Court on the ground of the company's failure to pay the costs of surveying, selecting and conveying the lands as prescribed by the Act of July 15, 1870 (see p. 357).

But the question presented as to the duty of the Northern Pacific Company to pay the survey fees is totally different to the question presented in this case as to the duty of the Union Pacific Co. arising out of the provisions in the granting act excepting mineral land from the grant.

The provision relating to survey fees is a general one referring to all granted lands. The language of the statute is as follows:

> "That before any land granted by this act shall be conveyed to any company or party entitled thereto * * * there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same by the said company or party in interest as title shall be required by said company."
>
> 13 Statutes, 365.

In 1870, when making the appropriation for the survey of the lands within the limit of the grant to the Northern Pacific Railroad Co., Congress added this proviso:

> "That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same by the said company or party in interest."
>
> 16 Statutes, 305.
>
> Northern Pacific Railroad Co. vs. Traill County, 115 U. S., pp. 607 and 608.

These provisions, it will be noticed, apply to every acre of land granted to the company.

Of all words known to our legal nomenclature to express a condition precedent, none is stronger or more apt than the word "before." Hence, the payment into the Treasury of the United States of the cost of surveying, selecting and conveying the land by the company or party interested was an absolute condition precedent to any conveyance by the United States or under its authority. The construction of these provisions was all that was involved in the case of Ankeny vs. Clark, 148 U. S., 345, and has no bearing whatever in the case at bar, where no such provision is involved.

It certainly does not follow that because a grantor may be required to prove the payment of survey fees, without which payment he has no power to convey, that a grantor whose general title to his lands is conceded, except as to mineral lands, is bound to assume the burden of showing that his lands are not mineral.

The payment of the survey fees is an act of the grantor. The duty prescribed by the statute applies to all the lands which he holds. There is no difficulty whatever in furnishing the proof. He holds the receipts in his own control and can establish in a moment without difficulty the fact of payment and thus establish his right to convey. The obligation to pay the survey fees is created by the act. The sit-

uation is the same as though Congress had by public act imposed a tax, say, of fifty cents per acre upon all the lands granted to the railroad company. The act itself would prove the incumbrance, and if the act further declared that the company should have no power to convey until the tax were paid it would clearly be the duty of the railroad company to show that the incumbrance had been discharged and the full right to make deed of the property acquired; but none of these considerations apply to the case of the exception of mineral lands.

In the case of the obligation to pay survey fees, the act itself proves that the lands in question were subject to the burden.

In the case of the excepted mineral lands, the lands in question cannot be assumed to be within the exception unless proved to be mineral.

We may add in disposing of this case that the Court does not hold, even as to the obligation to prove payment of survey fees, that the burden of proof rested upon the seller. The conclusion that the survey fees had not been paid is based by the Court upon the failure of the seller, Ankeny, to aver the fact of payment in his answer and upon the stipulation. We cannot, therefore, conclude what the Court would have so held had there been no stipulation and had the pleadings been properly framed.

There is nothing inconsistent with the proposition made in this point in

Barden vs. Northern Pacific Railroad Co., 154 U. S., 288.

This was also an action to recover the possession of land brought by the Northern Pacific Railroad Co. It was conceded that the lands were mineral, but it was alleged that at the time the public grant became effective no part of the land was *known* mineral land (see p. 292). The only question litigated in that case was whether the lands excepted by the exception contained in the

grant were limited to lands known to be mineral at the time of the grant or whether the exception extended to lands discovered to be mineral at any time subsequent. The Court held that lands discovered to be mineral at any time subsequent to the date of the grant were, nevertheless, excepted. In the opinion rendered in the case at bar the decision in the Barden case is largely relied upon to sustain the claim of Reed and Henderson. The Court says at page 50 of the record :

> "As to lands containing minerals, whether known or unknown, no title passed, and the failure of the Government to explore or issue patents, and the great lapse of time, have not ripened a defective title into an indefeasible one. This being true, until patent issues there would be uncertainty as to the character of one's title."

And at page 52 :

> "The Railroad's title then to this land is subject to be defeated. At most its title is a base or determinable fee. It may be continuous forever, or it may be determined at any moment prior to the issuance of patent upon discovery of mineral."

If this argument be sound it must follow that the land-grant railroads can convey no title whatever until after the issue of a patent.

It is an obvious misstatement to call the title a base fee or to say that it is necessarily uncertain or liable to be defeated. As to the vast majority of the lands granted, which are in fact agricultural, the railroads' title is confessedly perfect, certain and subject to no contingency whatever. If, therefore, the burden of proof rests upon Reed and Henderson to establish their allegation that Adams and Schilling were not seized, there is nothing in the Barden case to relieve

them from this burden. If to the rule extending the excepted lands which do not pass by the grant to lands discovered to be mineral at any time subsequent to the grant we should add the further rule that in all actions brought by grantees against grantors the grantee must prevail unless the grantor prove affirmatively that the lands are not mineral, we throw, as we have shown, a vast number of titles into confusion, uncertainty and litigation.

In support of the extent of this disaster we call the attention of this Court to the concluding language of the dissenting opinion of Judge BREWER in the Barden case, at page 349 :

> " To now overthrow that and establish a new rule not merely unsettles the question of title to the lands within this vast area, but it may produce complications which we do not now perceive in the rights of individuals and counties, and even of the States along the line of this road."

We think we are safe in asserting that if the present case be affirmed upon the proposition now under discussion, it will be the pioneer in a procession of many thousand cases in all of which grantees who are weary of their bargains will recover against their unfortunate grantors.

The reasonable solution of this whole difficulty is to hold the buyer to his bargain, unless he shows that his grantor's title has failed by proof that the lands are in fact mineral.

POINT III.

The difficulty discussed in Point II. cannot be overcome by limiting the right of the land grant railroads to convey lands after patent issued.

In point of fact a vast amount of these lands have been conveyed by land grant railroads in anticipation of the issue of a patent. These sales and conveyances have been made to an army of purchasers, many of whom have again conveyed; the lands have been settled, occupied and improved, and all this in reliance upon the numerous decisions of this Court holding that the public grants vested a title *in præsenti* at the time of the grant and without reference to the issue of patent. A declaration, therefore, that the railroads should not convey before the issue of patent would afford no relief to the vast army of grantees of the railroad and subsequent grantees. The question to be passed upon relates to the rights and obligations as between Adams and Schilling and Reed and Henderson, and a declaration relating only to the question of the duties of the Union Pacific Railway Company will not assist in the solution.

Moreover, it is manifest from the Act of July 1, 1862, that it never was intended to require these land grant railroads to wait until patents were issued before selling their lands. The grant of the lands is contained in Section 3 of the act. The close of this section is as follows:

> "And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption like other lands at a

price not exceeding $1.25 per acre to be paid to said company."

And it is manifest from the language quoted that it was the intention and design of Congress that the railroad should, immediately after the grant became effective, sell and dispose of the granted lands. The object was to encourage the settlement of the public domain and to extend to all those willing to purchase lands and settle there an immediate opportunity to acquire farms and residences throughout the far West.

It is now thirty-five years since the grant was made, and twenty-eight years since the railroad was completed. There still remains a vast area of these public lands as to which patents have not yet issued. The details of the location, surveys, determination of the character of the lands and the enormous volume of patents to be issued has made it impossible for the Department of the Interior to complete this work during this long lapse of time.

It must, therefore, be conceded that it would have been impracticable to require that no sale should be made by the railroad companies until after patents were issued. Such requirements would have defeated the very purposes of the grant. It would be contrary to the general understanding, and the uniform practice.

POINT IV.

The acts of March 3, 1887, and of March 2, 1896, and the concurrent resolution of June 10, 1896, confirmed as against the United States the right and title of bona fide purchasers of lands contained within the limits of railroad land grants, so that,

as against such bona fide purchasers, the United States, by the acts cited, expressly disclaims any rights whatever, and confirms absolutely the title of such bona fide purchasers.

It appears from the proofs in this case that the lands in question were purchased from the Union Pacific Railway Co. by William Van Dyke and John Selman,

See Finding XV., p. 21.

and by Adams and Schilling,

See Finding XVI., p. 22.

and that the lands so obtained were conveyed by Adams and Schilling to Reed and Henderson for the sum of $7,333.32.

See Findings I. and IV., pp. 18 and 19.

It, therefore, follows that Reed and Henderson are *bona fide* purchasers for value of all of the property in question.

The only ground upon which they base their right to rescind is that the title of Adams and Schilling is open to question, because the United States, in the event of the discovery of mineral, before patent issued, would have the right to challenge their title and to claim that the lands were excepted from the grant. But the Act of March 3, 1887, as the same has been construed by this Court, protects the title of Adams and Schilling as *bona fide* purchasers, even if the lands in question should prove to be mineral before the issue of the patent by the United States.

The right of Reed and Henderson to recover their purchase money rests upon the conjectural and extremely improbable future discovery of mineral. The Acts of 1887 and 1896 expressly confirm their title as against the United States.

The case now at bar is one in which no patent has issued, where the *locus in quo* is occupied as agricultural lands, and where no minerals are known to exist, and being in a valley where it is in the highest degree improbable that any minerals exist or will ever be discovered. If the lands are not mineral lands, it is admitted that they are within the grant, and that the title of the Union Pacific Railway Company thereto was perfect, and consequently the title of Reed and Henderson is perfect. Under the *Barden case*, if minerals should be discovered prior to the time when the patent issues, these lands would be excepted from the grant, and in that event the title of Reed and Henderson would fail if it had not been confirmed (as it has been) by Congress.

For the convenience of the Court we print as an appendix hereto the text of the Act of March 3, 1887.

The 5th section of the Act of March 3, 1887, is the one which deals with lands within the "place limits" of the grant which have never been patented or certified, and which are for any reason excepted from the grant. The text of Section 5 is as follows:

> "SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: *Provided*, That all lands shall be ex-

cepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor:

"*Provided Further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

Even if it had been discovered prior to the bringing of this suit that the lands in question were "mineral" within the meaning of the grant, and therefore originally excepted from the grant, nevertheless section five just quoted confirms the title of Reed and Henderson, for it will be seen that this section in terms confirms the title in all such cases where the lands so sold by the company are "*for any reason excepted from the operation of the grant to the company*," requiring only of Reed and Henderson that they "make payment to the United States for said lands at the ordinary Government price of lands [that is, $1.25 an acre], and thereupon patents shall issue therefor to such *bona fide* purchaser, his heirs and assigns."

The act of March 3, 1897, is printed in full in *United States vs. Winona and Saint Peter Railroad Company*, 165 U. S., 463, 466–469, foot-note.

Sections 3, 4 and 5 of that act are commented on at large and construed in the case just cited. Sections 3 and 4 deal with cases where a patent has issued, and

are not therefore specially applicable (except in their general provisions and as throwing light on Section 5) to the case at the bar. But Section 5, quoted *supra*, is the one specially applicable to *unpatented* lands, and the following is what the Court says as to the meaning and purpose of this section:

> "Section 5 of the same act applies to cases in which no certification or patent has issued, and yet the lands sold by the railroad company are the numbered sections prescribed in its grant and coterminous with the constructed portions of its road, and it is there provided that where the lands so sold by the company 'are for any reason excepted from the operation of the grant to said company,' the purchaser may obtain title directly from the Government by paying to it the ordinary Government price of such lands. It is true the term used here is '*bona fide* purchaser,' but it is a *bona fide* purchaser from the company, and the description given of the lands, as not conveyed and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has, nevertheless, purchased in good faith from the railroad company.
>
> "We have been referred in the arguments of this and other cases to the debates in Congress, and to the reports of the committees of the two houses to whom the bills were referred as con-

firmatory of the conclusions we have reached, but it is unnecessary to consider any of the evidence derived from these sources, if, indeed, it is open to consideration, for the language of the two acts is clear, and fully discloses the intent of Congress. Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

Under the operation of this fifth section, even if the lands were mineral and known to be such, the title of Reed and Henderson is confirmed and protected on the sole condition of paying to the United States $1.25 an acre for the land. If they should sue the company on the covenants in its deed, that would be the full measure of their recovery. In this case a conveyance has been actually made by the company to Reed and Henderson, or to their grantors. They are in actual possession, through their tenants, cultivating and enjoying the land. Neither their title nor their possession has been disturbed or questioned either by the Government or by any one else. Who ever heard of an executed contract for the sale of lands amounting to several thousand dollars, under the circumstances of this case, being rescinded and annulled because of an insignificant incumbrance of a few hundred dollars, which in any event it is within the power of the grantee to pay and save his lands?

The Act of March 3, 1887, is a complete answer to the claim on the part of Reed and Henderson for a rescission, even if the contract were executory and no deed had ever been made. The rule in equity is that contracts are not to be rescinded except where the subject matter of the contract substantially fails, and where compensation cannot be awarded without doing injustice in respect of the part to which the title fails.

Bispham Eq., 4 Ed., p. 450, Sec. 389.

But when the case is considered in the light of the larger provisions of the Act of March 2, 1896, the equity of Reed and Henderson to a rescission stands completely negatived, since the express decision of this Court in the *Winona and Saint Peter Railroad case* is that the phrase *bona fide* purchaser, as used in the said Acts of 1887 and 1896, does not mean the same as the phrase *bona fide* purchasers, as such purchasers are defined by a court of equity, which requires the three elements of a valuable consideration, absence of notice, and presence of good faith; but, under said acts, only actual good faith in the purchaser is required.

Construing the said Acts of 1887 and 1896, this Court expressly held that they operated "to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

The effect of this legislation is to confirm the title to Reed and Henderson, even though we assume that, because of their mineral quality, the lands were

excepted from the operation of the grant. The general purpose of this legislation, as declared by this Court in a recent case—United States, appellant, against the Winona and St. Peter Railroad, 165 U. S., p. 463—was to effect an adjustment of the titles of *bona fide* purchasers of land-grant lands. The whole object of the act was to declare that, as far as the United States was concerned, it would not disturb the right and title of *bona fide* purchasers, but that all such titles are intended to be ratified and confirmed. In construing the Act of 1887, and the kindred Act of March 2, 1896, the Court says, at page 477:

> "We are of the opinion that Congress intended, by the sentence we have quoted from the Act of 1896, to confirm the title, which, in this case, passed by certification to the State, which not only declares that no patents to any lands held by a *bona fide* purchaser shall be vacated or annulled, but it confirms the right and title of such purchasers. Given a *bona fide* purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the Government to disturb it."

Concurrent Resolution of June 10, 1896, Considered.

If there could be any doubt, under the decision of this Court, in the *Winona and Saint Peter Railroad Company case*, that the Acts of 1887 and 1896 confirmed the title of Reed & Henderson, all such doubt is removed by the *concurrent resolution adopted by Congress June 10, 1896* (29 Stat. at L., App., p. 10), which is as follows:

> "UNION PACIFIC LAND GRANTS.—*Resolved, by the House of Representatives (the Senate concurring)*, That the Secretary of the Interior be, and

he hereby is, authorized and directed to resume work upon, and to issue patents to, the Union Pacific Railway Company, without delay, to all lands which have been sold by said company to *bona fide* purchasers; *Provided*, That nothing herein contained shall be construed as waiving any right that the United States may have to declare a forfeiture as to the lands which have not been so sold by said company; *Provided*, That the words '*bona fide* purchasers' herein contained shall not be held to include the holders of lands secured by mortgages on such land grant.

"Passed the House of Representatives June 6, 1896.

"Passed the Senate June 10, 1896."

In this resolution Congress dealt specifically with the Union Pacific land grant; and, although the company was, on June 10, 1896, in default in its obligations to the Government, and known to be so, yet so highly favored was the case of *bona fide* purchasers from the company, that Congress peremptorily directed the Secretary of the Interior to resume work upon, and to issue patents to, the Union Pacific Railway Company, without delay, to *all* lands which had been sold by said company to *bona fide* purchasers. Reed & Henderson, being such purchasers, are within the plain terms and provisions of this relief resolution. Under this resolution, even if the *locus in quo* were now known to be mineral, the title of Reed & Henderson would be confirmed; and note that it is *not made a condition of such confirmation that they shall pay anything to the United States*. Whatever remedy the United States would have for the recovery of the purchase price of the land, to wit, $1.25 an acre, would be against the company, and not against the purchaser; and, in this view, Reed & Henderson would have a full, absolute and indefeasible title as against the

United States, without the payment of any money whatsoever.

There is no claim that the title is imperfect in any respect, except as against the United States. The United States has stepped in, and not only waived its claim, but confirmed the title of the purchaser. The confirmation by Congress of the title is in law and legal effect a grant of the land, since a legislative act of confirmation operates not only as a conveyance, but also as a statute or a law enacted by proper authority declaring the force and effect of such conveyance, which is that the title of the confirmee is made effectual for all intents and purposes from the time of its inception.

Hoffnagle vs. Anderson, 7 Wheat., 212, and the previous cases in this Court there cited.

See, also,

Ryan vs. Carter, 93 U. S., 78, 82.
Langdeau vs. Hanes, 21 Wall., 521, 529.
Tripp vs. Spring, 5 Sawy., 209, 216, FIELD, J.

The confirmation is therefore retroactive, and operates on the present title even if it were originally defective. This confirmation by Act of Congress was as valid for the purpose of vesting and confirming the title of the purchaser as a specific release or conveyance would have been, since it is well settled that Congress may make a grant of lands directly by statute, just as well as indirectly through a patent issued by the officers of the Interior Department. If a specific grant or release had been made under authority of an Act of Congress, we could bring that grant or release into this Court, and, on the authority of the decisions above referred to, have the benefit thereof.

We, therefore, submit, that the reasons assigned in the decision appealed from for holding the title of Adams and Schilling to be bad, because of the possible future discovery of mineral wealth, are untenable.

POINT V.

The contention that the title of Adams and Schilling was encumbered by a reservation contained in the lease reserving to the railroad the right to enter upon the lands and prospect for coal and other minerals is untenable.

The reservation alleged to constitute an incumbrance is set forth in Finding XXII., page 24.

At folio 50, page 30, it appears that a quitclaim deed was executed by the Union Pacific Railroad Company to Adams and Schilling, remising and releasing and forever quitclaiming to them all the title of the railroad company to the land in question. The only ground upon which it is alleged that the reservation in question formed an incumbrance upon the property is that the language of the reservation is "The exclusive right to prospect for coal and other minerals," but a release of all the title of the railroad company would, of course, discharge such reservation in its entirety. The fact that the general words in the deed are followed by the words "All its interest and claim to any coal which may be hereafter found" does not in any manner limit the effect of the general words "All the title of the railroad company."

It may be added on this point that the universal current of authority holds that a breach of a covenant against incumbrances is no ground for a judgment rescinding a contract, but only ground for recovery of damages upon proof of their extent.

POINT VI.

Where the vendor in a sale of land executes a conveyance to a purchaser with warranty of title, as in this case, the deed becomes the only contract between the parties, and the vendor's previous representations as to the validity of his title, or the right of possession which it gives, are regarded as mere expressions of confidence in his title, and are merged in the warranty and covenants which determine the extent of his liability; and, unless there is positive or actual fraud, the contract will not be rescinded, but the grantee confined to the remedy which his covenants give him. Such is the established doctrine of our law, both in this court and elsewhere.

We have heretofore in this brief considered the case at bar as if there were an executory contract between the appellants and the respondents for the sale of this land; and we have shown that, even in such case, the contract, under the circumstances, could not be rescinded. We now propose to consider the case in its true light, namely, as one where the contract for the sale of the land has been executed by an actual conveyance with covenants.

Let us recapitulate the facts in this regard:

The land is within the terms of the grant to the railroad company unless it is "mineral." No minerals are known to exist. The United States have never refused to patent the lands because they were mineral, or because they were not embraced in the grant to the company. On the contrary, Congress by the concurrent resolution of June 10, 1896 (29 Stats. at L. App.,

p. 10), has specifically directed the Secretary of the Interior "to issue patents to the Union Pacific Railway Company without delay to *all* lands which have been sold by said company to *bona fide* purchasers."

The appellants were in possession at the date of the conveyance to the respondents, cultivating the lands as agricultural lands. The appellants conveyed with warranty. The respondents took possession, and shortly thereafter executed a lease of the lands to the appellants, and as such tenants the appellants were in possession up to and including the time of the trial. There is no proof or finding of actual fraud in the sale, and no proof of any fraud whatsoever. The only finding is that, at the time or a day or two before the purchase by the respondents, Mr. Adams stated that the appellants had a good title to the property, and that they would get an abstract for the respondents (Record, p. 18). There is no finding that Mr. Adams did not make this statement in good faith. There is no finding that it was made with intent to deceive or defraud. On the contrary, it is evident that this statement was made in good faith and with no intention to defraud. The appellants refused to sell a full interest in the land, and only sold two-thirds interest. The appellee Henderson so testified (Record, p. 34). On this state of facts we venture to say that it was never before heard of that a deed could be canceled and the sale rescinded.

In the cross-complaint the respondents set up a case of actual fraud and reliance upon the fraudulent representations of the appellants. It is alleged in the cross-complaint that on March 27, 1890, the plaintiffs represented to the defendants that the plaintiffs had a good title in fee simple to the land in question; that defendants believed the said representation, and relying thereon purchased said lands from plaintiffs, receiving the warranty deed, copy of which is set out in the plaintiffs' complaint; that the plaintiffs did not have such title; that plaintiffs' said representations "were false and fraudulent; and that the *plaintiffs did then and there*

know that such representations were false and fraudulent and untrue, and were made to deceive these defendants" (Record, p. 15).

In other words defendants relied on a plea of actual fraud and not on a defective title, except as such title, if defective, supported their averment that a representation of good title was untrue.

The Referee found that the representation as to title was made as alleged, and that it was in fact untrue (Finding 3, Record, p. 18), but failed to find any *scienter* or any fact inconsistent with the most perfect good faith in plaintiffs when they made the representation. And in Conclusion of Law No. 3, the Referee finds that such misrepresentation was "a *fraud in law* upon said defendants" (Record, p. 25); thus distinguishing between intentional fraud and one not intended; between moral turpitude and innocent misrepresentation.

The question then arises, is a contingent failure or contingent defect of title, coupled with an innocent misrepresentation as to such title, sufficient to authorize a court to rescind an executed contract, such as a warranty deed.

It is familiar law that:

> "Where a deed is executed in pursuance of a contract for the sale of land, all prior proposals and stipulations are merged, and the deed is deemed to express the final and entire contract between the parties."
>
> *Williams* vs. *Hathaway*, 19 Pick., 488.
> *Jones* vs. *Wood*, 16 Pa. St., 25.
> *Carter* vs. *Beck*, 40 Ala., 599.

In *Dart's Vendors and Purchasers*, Ch. 14, Sec. 5, the rule is thus laid down:

> "With some few special exceptions a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of defects either in the title to or quantity

or quality of the estate which are not conveyed by the vendor's covenants."

And in Sec. 6 he enumerates the special exceptions in which there is a remedy after conveyance, and these are all cases either of *actual fraud* on the part of the vendor or where the subject matter of the contract had no existence, and hence the contract void for failure of an implied condition.

See opinion of WILLIAMS, J., in *Joliffe* vs. *Baker*, L. R., 11 Q. B. Div., 267.

In the case just cited the court said:

"That so far as such conditions [statements as to title in written conditions of sale given to intending purchaser] form part of any contract, they are entirely merged in and superseded by the formal deed of conveyance."

Such is the doctrine of this Court.

Thus, FIELD, Justice, in delivering the opinion of the court in *Andrus* vs. *Smelting Co.*, 130 U. S., 643-648, said:

"Where the vendor, holding in good faith under an instrument purporting to transfer the premises to him, or under a judicial determination of a claim to them in his favor, *executes a conveyance to the purchaser, with a warranty of title and a covenant for peaceable possession*, his previous representations as to the validity of his title, or the right of possession which it gives, are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty and covenant which determine the extent of his liability."

This principle is so familiar that it has gone as undisputed law into the text books, and is thus stated in *Rawle on Covenants*:

"The distinction between the rules which govern the relation of vendor and purchaser before and after the execution of the deed—*while the contract is still* EXECUTORY, *and after it is* EXECUTED—is a broad and familiar one. Although the general principles of the contract of sale of real estate, both in this country and in England, exact less from the vendor than the rules of the civil law demand, yet, while the contract is still *executory*, they recognize and enforce the right of the purchaser to a title clear of defects and incumbrances, and this right, it has been often said, is one not depending for its origin upon the terms of the contract, but is given by the law; nor, except in particular cases, is it affected by the nature and extent of the covenants for title which the purchaser is to receive."

"*But when the deed of conveyance has been delivered, a different rule applies. The contract is then executed*, and any inconsistencies between its original terms and those of the deed are, in general, to be explained and governed solely by the latter, into which the former is merged, and by which the parties are thereafter to be bound, *and the purchaser's only right to relief*, EITHER AT LAW OR IN EQUITY, *from defects or incumbrances, depends, in the absence of fraud, solely upon the covenants for title which he has received.*"

Rawle on Covenants, 3d Ed., p. 611.
See, also, *Sugden on Vendors and Purchasers*, 684.
Dart on Vendors and Purchasers, 363.

That no misrepresentation, unless it be willful, furnishes an exception to the rule, is also well settled.

A case much in point is *Legge* vs. *Croker*, 1 Ball and Beatty, 506, in which the lessor had assured the lessee that there was no right of way over the ground; that there had been formerly but that it had been legally stopped by a grand jury presentment forty years

before. It turned out that there was a footway, the presentment applying only to a carriageway, and the lessee was convicted for obstructing it, whereupon he filed his bill to be relieved from the lease; but Lord MANNERS dismissed his bill, saying:

> "If there were a willful misrepresentation, the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way it cannot be called a misrepresentation."

In *Wilde vs. Gibson*, 1 H. L. C., 605, it appeared that Lady Wilde sold certain building lands to Mr. Gibson, the lands were described as unaffected by any right of way over them. After the purchase was completed the vendee discovered that a public way passed through the property and that the vendor's mother—from whom she had inherited the land—had executed a deed to the authorities of the town acknowledging the right of way and covenanting to pay a nominal rent each year for the privilege of inclosing the portion of the land over which it ran, and to open it whenever required. This rent had been regularly paid down to the date of the sale.

Lady Wilde had no actual knowledge of the existence of this deed or of the payment of the rent. The town authorities required the old way to be opened and Gibson then filed his bill to set aside the conveyance to him and to recover the purchase money, and KNIGHT BRUCE, V. C., entirely acquitting Lady Wilde of personal fraud or deception in the matter, set aside the conveyance. Upon appeal to the House of Lords this decree was reversed.

Lord CAMPBELL said:

> "In the court below the distinction between a bill for carrying into execution an executory contract and a bill to set aside a conveyance that had been executed has not been distinctly borne in

> mind; with regard to the first, if there be misrepresentation or concealment which is material to the purchaser a court of equity will not compel him to complete the purchase; but where the conveyance has been executed * * * a court of equity will set aside the conveyance only on the ground of actual fraud; and there would be no safety for the transactions of mankind if, upon discovery being made at any distance of time of a material fact not disclosed to the purchaser of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside."

In *Aliffe vs. Baker*, L. R. 11 Q. B. Div., 255, the vendor represented that a certain lot contained three acres, the vendee bought on the faith of this representation, paid the purchase money and received his deed. The vendor had himself bought the same lot as containing three acres and believed on some reason that his representation was true. On a survey it was ascertained that there were only about two and one-fourth acres in the lot, and the vendee sued for compensation for the deficiency, alleging the misrepresentation of his vendor, which he claimed to have been fraudulent. The plaintiff recovered judgment in the court below. On appeal it was strenuously urged in support of this judgment that the misrepresentation as to the quantity of land was a legal fraud even if there were no intended deceit. The judgment was reversed. WILLIAMS, J., after citing the opinion of Lord Bramwell, in *Weir* vs. *Bell*, L. R. 3 Ex. Div. 238 243, said:

> "Armed with this authority of Lord Bramwell, I reject the phrase 'legal fraud,' as distinguished from moral 'fraud and deceit,' as wholly inapplicable and inappropriate to legal discussion, and I simply ask the question in the present case, do the

facts disclose a case of fraud? and I replied unhesitatingly that they do not. Perhaps it is scarcely necessary to add that there can be no doubt that, if a man affirms something as a positive fact concerning which he has no knowledge whatever, knowing neither whether it is a fact or not, and does so intending to induce another person to act upon it as a fact, and for his own benefit, regardless of whether the fact is so or not, then that is the strongest possible evidence of fraud in the plain meaning of the word. * * * Still, even in such a case as that, the fraudulent element must be found to exist *as a fact*, and cannot be adopted as a mere *inference of law*. * * * And see *Haycraft* vs. *Creasy*, 2 East, 92, where the defendant had said to the plaintiff that he knew as a fact of his own knowledge that he might trust a certain person to any amount, and it turned out that that person was in fact an impostor and without means, and that the defendant consequently could not in one sense have actually known what he said to be true; but that being himself duped he believed it. Lord Kenyon left the case to the jury as a case of fraud, not in the sense which affixes the stain of moral turpitude, but falling within the definition of *legal fraud*, and the jury under this direction found a verdict for the plaintiff; but this was afterwards set aside by the court, on the ground that it was essential that the jury should find that the defendant had acted in bad faith, and *malo animo* and *fraudulenter*."

A. L. Smith, J., said:

"I wish to add upon the point which was much argued at the bar on behalf of the respondent, viz.: as to what constitutes fraud, that in my judgment an action for damages for deceit cannot be maintained unless the plaintiff establishes that the de-

fendant has made a statement false in fact and fraudulent in intent. If a man makes a statement knowing it to be untrue with the intention that another should act upon it, that obviously is fraud; so also if a man recklessly, not caring whether it be true or false, makes a statement with the intention that another should act upon it, that also is fraud. In both cases there is the moral turpitude which in my opinion is necessary to maintain an action for damages for deceit. If a man makes a statement which he believes to be true, but which is in fact untrue, even though made with the intention that another should act upon it, this in my judg ment will not suffice to maintain an action for damages for deceit. In the present case the necessary moral turpitude is wanting. It seems to me misleading to talk of legal fraud in such a case as distinguished from moral fraud, and I adopt what was said by Bramwell, L. J., upon the point in *Weir* vs. *Bell*."

The rule is the same in equity as at law after a conveyance. Nothing short of actual positive fraud as distinguished from legal fraud will justify a decree of rescission for misrepresentation.

Southern Development Co. vs. Silva, 125 U. S., 247.
Wilde vs. Gibson, 1 H. L. C., 632.
Joliffe vs. Baker, L. R., 11 Q. B. D., 272.
Brownlie vs. Campbell, L. R., 5 A. C., 937.
Key vs. Jennings, 66 Mo. 356.
Clark vs. Tennant, 5 Neb., 549.

It must follow then that, as the intent to defraud, or the knowledge by plaintiff of the falsity of the representation was not found as a fact, but on the contrary, was substantially negatived, the facts found do not support the decree. Respondents have their remedy on the covenants in their deed for any defect of title or

incumbrance, if there be any, but cannot ask of a court of equity to be relieved of their purchase.

The fact that by a mistake of the scrivener there was a mistake in the deed cannot alter the case. The mistake is admitted and is found by the court. No other mistake is alleged. The deed with the mistake corrected was the *entire contract* between the parties and none the less merged all prior proposals, representations not fraudulent, and stipulations between the parties. This contract was an executed contract and not one to furnish in the future a certain quality of title for a certain sum. In the latter case defendants need not have accepted any title which was not in accordance with the contract. But in the former there in an absolute acceptance of the title, precluding a subsequent rejection except for fraud; the grantee, for his protection and knowing that he cannot thereafter rescind because of a defect in the title, insists on covenants of warranty. The policy of the law requires that he should be remitted to his remedy on such covenants rather than after the lapse, perhaps, of much time, he should undertake to rescind the entire transaction because the vendor, believing he had title, said so and showed his faith by warranting it. Men are apt to be sanguine of their right and to believe in their own title, and it would be safe to say that hardly a sale takes place without the vendor asserting the unimpeachable nature of his right.

Notwithstanding the mistake the equitable title to the land intended to be conveyed was vested in the defendants.

2 Beach Eq. Jur., Sec., 542, p. 615.
Bush vs. Bush, 33 Kans., 556.
Crawford vs. Edwards, 33 Mich., 354.

But it is sufficient to say that defendants did not take a contract for the future conveyance of a title of any particular quality; but required for their protection covenants of warranty instead.

POINT VII.

The conclusion of law that the representations made by Adams and Schilling to Reed and Henderson concerning the title of said land were untrue and a fraud in law upon Reed and Henderson is untenable.

The finding of fact upon which the above-quoted finding of law is based is the third finding. It rests entirely upon the proposition contained in the fourth finding of law at the foot of page 25 that the title of the Union Pacific Railway Company to the land in controversy is not a good title, but is encumbered, and what title it has may be defeated at any time by the United States before the issuance of patent.

This fourth proposition of law rests entirely upon the assumption that the burden of proof as to the mineral character of the land was on the sellers, Adams and Schilling, and that they have failed or neglected to prove that the lands were not mineral, it therefore follows that their title is bad.

It is clear that if this assumption is not justified, and the Court should hold with these appellants, that the burden of proof rested upon Reed and Henderson, and no such proof having been made by them, we cannot conclude that as a matter of fact the plaintiff's title was bad.

Reed and Henderson ask to rescind and to recover judgment. They say Adams and Schilling represented to them that their title was good and that representation was untrue and fraudulent.

Until it has been affirmatively proved that the title in question was bad, the Court cannot assume that any fraudulent or untruthful representation was made.

> "Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made

out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true. * * * Where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained."

Clark vs. Reeder, 158 U. S., 505-523.
Farrar vs. Churchill, 135 U. S., 609-615.

We assert to-day that the title of Adams and Schilling is absolutely good, free from all flaw, and that their purchasers have no cause of complaint whatever.

It seems to be a farce to characterize the statement made by Adams and Schilling that their title was good as a fraudulent statement entitling the purchaser to rescind. They certainly believed that their title was good. Their counsel, after patient investigation of years, still believes the title to be good. The record contains no proof from which this Court can conclude that the title was not good. If the lands are agricultural, the title is confessedly good; and is the mere possibility of the future discovery of mineral in any portion of the vast tracts covered by land grants to railroads to be considered such an infirmity that a statement by any one of these railroad companies that it has good title to land contracted to be sold is, *ipso facto*, to be treated as a fraudulent and untruthful statement which will entitle its grantee, or any subsequent grantee, to rescind as for fraud without further evidence than the production of the railroad company's deed? It is well-settled law that in actions to rescind for fraud or untruthful representation, or in actions to recover damages for fraud or misrepresentation, the accused must be found guilty either of misrepresentation, with knowledge that the fact represented is untrue, or else

he must be found guilty of representing that he had knowledge of the facts, when in point of fact he had no such knowledge.

Southern Development Co. vs. Silva, 125 U. S., 247.
Farnsworth vs. Duffner, 142 U. S., 43.
Wakeman vs. Dalley, 51 N. Y., 27.

It may be true that where a contract is wholly unexecuted an innocent mistake by one party will relieve the other party from the performance of the contract, but this principle does not apply where a contract has been executed in whole or in part.

In the present case the deeds for the property have been delivered. Reed and Henderson were put in possession; that is to say, that a lease from them by which they were recognized as landlords to Adams and Schilling, who thereby assumed the position of tenants, was executed and delivered. By these acts Adams and Schilling divested themselves of all ownership, and could not sell, or contract to sell, the lands to any one else. Reed and Henderson made their cash payments and delivered their obligations and mortgage to secure the same for the balance. In no just sense of the term can this contract be called an executory contract. In the opinion of the learned Court whose decision is appealed from authorities are cited to show that where an error has been made in a deed by mistake of the draughtsman equity will treat the erroneous deed as an executory contract and correct the mistake; but does it follow that because the deed in this case is to be treated as an executory contract to give a proper deed that the contract for sale, which has been fully carried out, is an executory contract?

The reason for the rule which has been so emphatically declared in courts of equity that contracts which have been executed will not be rescinded or set aside except for willful fraud, coupled with guilty knowledge on the part of the offender, is that where

the position of the parties has been essentially altered by delivery of title and possession on the one side and by payment of the consideration on the other, it is almost impossible to restore both parties to their former positions without doing injustice. If the case be one of willful fraud, the Court will rescind because it is just that the offending party be punished for his wrongful act; but, if the alleged misrepresentation be made without knowledge and without guilty intent, the Court declines to rescind and leaves the party claiming to have been injured to recover such damages or indemnity as he may prove himself to have suffered.

We refer on this point to the emphatic declaration made by this Court in

Atlantic Delaine Co. vs. James, 94 U. S., 207–214,

which was repeated with approval in

Union Railroad Co. vs. Dull, 124 U. S., 173, 183.

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

Applying the rule so clearly defined in the above words by this Court, can it be justly claimed that Adams and Schilling were guilty of fraud which has been made "clearly to appear" or of a false representation which has been "certainly proved." Their whole crime consists of the statement that their title was good, which they then believed, and now believe, to be true. The record is barren of proof that this statement was either willfully false or innocently untrue.

For the reason herein contained we submit that the judgment appealed from should be reversed and this suit remanded to the Supreme Court of the State of Utah for a new trial.

JOHN F. DILLON,
E. ELLERY ANDERSON,
P. L. WILLIAMS,
KIMBALL & KIMBALL,
Of Counsel.

APPENDIX.

Act of March 3, 1887.

An Act to provide for the adjustment of land grants made by Congress in aid of the construction of railroads and for the forfeiture of unearned lands and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the Secretary of the Interior be, and is hereby, authorized and directed to adjust, in accordance with the decision of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

SEC. 2. That if it shall appear upon the completion of such adjustments, respectively or sooner, that lands have been from any cause heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grants from the United States to aid in the construction of the railroads, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued to such lands, and to restore the title thereof to the United States.

SEC. 3. That if in the adjustment of said grants it shall appear that the homestead or pre-emption entry

of any *bona fide* settler has been erroneously canceled on account of any railroad grant, or the withdrawal of public lands from market, such settler upon application, shall be reinstated in all his rights and allowed to perfect his entry by complying with the public-land law: *Provided*, That he has not located another claim, or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated, within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public-land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any; and if there be no such purchasers, then to *bona fide* settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land-office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the Company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be

brought against such Company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor:

Provided Further, That this section shall not apply to lands settled upon subsequent to the first day of

December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 6. That where any such lands have been sold and conveyed, as the property of any railroad company, for the State and County taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the Government price, and patents for such lands shall thereupon issue. Provided, That said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of any actual settler.

SEC. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation or individual would be rightfully entitled.

Approved, March 3rd, 1887.